

Columbia Law School

Scholarship Archive

Faculty Scholarship

Faculty Publications

1998

Compensation and the Interconnectedness of Property

Thomas W. Merrill

Columbia Law School, tmerri@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Constitutional Law Commons](#), [Environmental Law Commons](#), [Property Law and Real Estate Commons](#), and the [Public Law and Legal Theory Commons](#)

Recommended Citation

Thomas W. Merrill, *Compensation and the Interconnectedness of Property*, 25 *ECOLOGY L. Q.* 327 (1998).
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/360

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

Compensation and the Interconnectedness of Property

*Thomas W. Merrill**

CONTENTS

Introduction	327
I. An Overview of the Scholarship	328
II. Paths Taken	332
A. Opposition to Compensation	333
B. Opposition to Diminution in Value	335
C. Public Choice Concepts	337
D. Compensation Threatens Environmental Values	339
E. The Inevitable Triumph of Public Control	342
III. A Path Not Taken	344

INTRODUCTION

Professor Joseph Sax's scholarship on the Takings Clause combines the craft of a first-class lawyer with the passion of a visionary. The good lawyer that he is, Sax's scholarship reflects a deep understanding of Supreme Court case law, legal history, and the practical dimensions of various kinds of land use disputes. Yet his work on takings is not animated by any desire for mere doctrinal tidiness. It is driven by a distinctive vision—one in which the earth's resources are becoming increasingly interconnected and in which there is an increasing need for the government to resolve conflicts regarding the use of these resources. Each of his writings on the Takings Clause, be it a law review article, speech, or book review, offers fresh insights in response to unfolding developments in compensation law.

Reading this body of work is like participating in a conversation that one hopes will never end. Unfortunately, it is a conversation that is fading from Professor Sax's end. As his scholarly interests and institutional obligations have multiplied in recent years, the time and energy he has been able to devote to the theory of the Takings Clause have clearly diminished. Yet when he does speak, one cannot help but listen, for his voice carries both authority and conviction.

Copyright © 1998 by ECOLOGY LAW QUARTERLY

* John Paul Stevens Professor of Law, Northwestern University. I am grateful for suggestions provided by Richard Lazarus and Saul Levmore.

This Article proceeds as follows. First, I describe Professor Sax's scholarship on the Takings Clause, organizing that work into four clusters defined both chronologically and by institutional affiliation. Then I examine certain recurring themes in the scholarship and consider how those themes develop (or fail to develop) over time. Finally, I focus more closely on Professor Sax's conviction that a proper understanding of the Takings Clause requires a redefinition of "property" and suggest that this premise may not be necessary to promote some of his underlying objectives.

I.

AN OVERVIEW OF THE SCHOLARSHIP

Let us begin with a brief overview of Professor Sax's writings on the Takings Clause. Professor Sax has authored twelve pieces that deal primarily with this topic. They fall rather naturally into four clusters, distinguishable in terms of chronology, subject matter, and intellectual style.

Sax's takings scholarship begins with his 1964 article, *Takings and the Police Power*.¹ Here, he comments extensively on the disorder in the Supreme Court's takings jurisprudence. Then, in an effort to bring order out of chaos, he presents his own original theory of the Clause. We are all familiar with the genre. Sax in effect invented it with this piece.²

The *Police Power* article classifies government action as either enterprise or mediation. When the government competes for resources with other potential users—for example, when it acquires land for a highway or a post office—it acts as an enterprise and must pay compensation.³ However, when the government settles a conflict between private claimants to a resource—as when it adopts a zoning ordinance that precludes operating a brickyard in a residential area—then it acts as mediator and does not need to pay compensation.⁴ Sax justifies this theory on the ground that it generates outcomes largely congruent with those reached by the Supreme Court, but without the Court's doctrinal incoherence.⁵ He also argues that this approach is normatively satisfying, because it requires that compensation be paid in

1. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L. J. 36 (1964)[hereinafter Sax, *Police Power*].

2. Earlier work of course had commented on the vagaries in the case law. See, e.g., Allison Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63. But, as far as I am aware, Sax was the first to couple such a critique with an alternative normative conception.

3. See Sax, *Police Power*, *supra* note 1, at 62.

4. See *id.* at 62-63.

5. See *id.* at 70.

those circumstances where the danger of arbitrary or unfair government action is greatest.⁶

The second cluster of articles spans the longest period. This cluster was launched in 1971 with *Takings, Private Property and Public Rights*.⁷ Sax sounded similar themes in the early 1980s with a public lecture entitled *Some Thoughts on the Decline of Private Property*.⁸ The work in this cluster focuses on a critical feature of the disputes that fall within the 1964 *Police Power* article's mediation category.⁹ Specifically, these articles are concerned with developing the implications of what Sax calls the "interconnectedness" of property for compensation policy.

Sax himself regarded the 1971 *Public Rights* article as a substantial revision of his *Police Power* article,¹⁰ and in some respects it was. The central theoretical construct shifted from a distinction based on the nature of the government action to one based on the nature of the use of property. When the government seeks to regulate a use of property that entails a spillover effect, Sax now argues that the government action is a matter of "public rights" and does not require compensation.¹¹ However, compensation may be appropriate when the government seeks to regulate a use that does not involve any spillovers.¹²

Although the theoretical ground had shifted, the general structure of the argument in the *Public Rights* article is not terribly different from the argument Sax made in 1964. Both articles rest on broad dichotomies, and in both cases the dichotomy turns on whether the government is doing something like regulating externalities. In Sax's view, however, the shift in focus from the nature of the government action to the nature of the use of property necessitated a change in position on a few critical issues. His position on wetlands regulation is the most striking illustration in terms of disputes that would take on prominence later. The 1964 *Police Power* article, although generally arguing that compensation was not required for losses associated with zoning regulations, nevertheless took the position that regulations

6. See *id.* at 64-67.

7. Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971) [hereinafter Sax, *Public Rights*].

8. Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983) [hereinafter Sax, *Decline*]. Although it fits imperfectly in my four categories, I would also place his review of Richard Epstein's *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) in this group. See Joseph L. Sax, *Takings*, 53 U. CHI. L. REV. 279 (1986) [hereinafter Sax, *Takings*].

9. See Sax, *Public Rights*, *supra* note 7, at 150, 151.

10. See *id.* at 150, n.5.

11. See *id.* at 151, 154-55.

12. See *id.* at 161. "Spillover" is a somewhat dated term meaning externality, that is, a benefit or cost of an activity that is not reflected in any contractual exchange.

prohibiting the development of wetlands should be deemed a taking, since the prohibition is tantamount to government acquisition of a conservation servitude.¹³ In the 1971 *Public Rights* article, however, Sax repudiated this conclusion, noting that the filling of wetlands has spillover effects on other property, such as flood control problems on lower lying land.¹⁴ Accordingly, Sax changed his position and argued that regulations prohibiting the development of wetlands should not require compensation.

The works in the third cluster of articles, written in the late 1980s and early 1990s, comment on the Rehnquist Court's turn toward more aggressive enforcement of the Taking Clause. A 1993 article, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*,¹⁵ is the rhetorical crown jewel of Sax's work on the Takings Clause. The vision of interconnected property is here relabeled the "economy of nature,"¹⁶ and Justice Scalia is engagingly cast as the arch-defender of the old "transformative economy,"¹⁷ seeking to shore up the right to develop property against the implications of the new vision.

These articles tell us that there is less than meets the eye to the Court's recent pro-compensation decisions. Sax argues that, notwithstanding the Court's obvious sympathy for property rights, its decisions are at most symbolic. They are unlikely to have any lasting effect in reversing the march of history toward greater interconnectedness of property and the related need for government regulation.

The final cluster consists of relatively informal articles and speeches from the mid-1990s commenting on proposed legislation that would have expanded the right of compensation for interference with property rights.¹⁸ Sax has been unrelentingly critical of these proposals, suggesting that legislators are foolish to believe that they can im-

13. See Sax, *Police Power*, *supra* note 1, at 72-73.

14. See Sax, *Public Rights*, *supra* note 7, at 157.

15. Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993) [hereinafter Sax, *Economy of Nature*]. The themes of the *Stanford* article are anticipated but less fully developed in Joseph L. Sax, *The Constitutional Dimensions of Property: A Debate*, 26 LOY. L.A. L. REV. 23 (1992). Also included here is an article on the several takings cases decided by the Court in 1987. Joseph L. Sax, *Property Rights in the U.S. Supreme Court: A Status Report*, 7 UCLA J. ENVTL. L. & POL'Y 139 (1988) [hereinafter Sax, *Status Report*]. And, although it also addresses nonconstitutional questions, I would include in this cluster Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257 (1990). See also Joseph L. Sax, *Rights that "Inhere in the Title Itself": the Impact of the Lucas Case on Western Water Law*, 26 LOY. L.A. L. REV. 943 (1993).

16. Sax, *Economy of Nature*, *supra* note 15, at 1442.

17. *Id.* at 1446.

18. Joseph L. Sax, *Using Property Rights to Attack Environmental Protection*, 14 PACE ENVTL. L. REV. 1 (1996) [hereinafter Sax, *Using Property Rights*]; Joseph L. Sax, *Takings Legislation: Where It Stands and What Is Next*, 23 ECOLOGY L.Q. 509 (1996) [hereinafter

prove upon the compensation formulas developed by the Supreme Court.¹⁹

Interestingly, these four chronological clusters of articles also correspond with changes in Professor Sax's institutional affiliations. The 1964 *Police Power* article was written early in his career at Colorado; the 1971 *Public Rights* article and other "interconnectedness" pieces were written during his long tenure at Michigan; the articles on the Rehnquist Court and the economy of nature were written after his move to Berkeley; and the articles on property rights legislation were written while he was serving as Counselor to the Secretary of the Interior.

The different institutional affiliation of each cluster may account in part for the changes in intellectual style. In the 1964 *Police Power* article, Sax engages in a classic exercise of doctrinal analysis. The Supreme Court's decisions are Sax's primary source of inspiration, and he judges the success of his normative theory in part by comparing its outcomes to those of the Court. Although some of the ideas in the article anticipate the future importance of the Coase theorem and public choice theory to environmental law,²⁰ the footnotes acknowledge no interdisciplinary influences.

The pieces written at Michigan reveal a distinct turn toward theory. Indeed, the 1971 *Public Rights* article is an exercise in normative law and economics. The writing here is inspired by the work of Ronald Coase, Guido Calabresi, and Mancur Olson—scholars whose work is influenced by economics.²¹ The ultimate criterion by which Sax would have his revised theory judged is, believe it or not, wealth maximization. As he states at one point, "the goal of a system which regulates property rights should be the maximization of the output of the entire resource base upon which competing claims of right are dependent"²²

To be sure, the later articles in this cluster, written after a 12 year hiatus, reveal a distinct shift in sensibility. Most notably, the jargon of economics disappears. What were described as "spillovers" in 1971 become "nonexclusive uses" by 1983 and explicit references to wealth

Sax, *Takings Legislation*]. See also Joseph L. Sax et al., Debate, *Taking "Takings Rights" Seriously*, 9 ADMIN. L.J. AM. U. 253 (1995).

19. See Sax, *Takings Legislation*, *supra* note 18, at 512, 515; Sax, *Using Property Rights*, *supra* note 18, at 3.

20. See Sax, *Police Power*, *supra* note 1, at 49-50 (describing externalities as having reciprocal causes in a manner similar to Coase); *id.* at 64 (describing government procurement decisions as being driven by political factors).

21. See Sax, *Public Rights*, *supra* note 7, at 152 n.9 (citing Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960)); *id.* at 174 n.47 (citing MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* (1965)); *id.* at 177 n.55 (citing GUIDO CALABRESI, *THE COST OF ACCIDENTS* (1970)).

22. *Id.* at 172.

maximization as a normative criterion disappear.²³ But, in substance the argument remains largely unchanged.

The third cluster of articles, which Sax wrote at Berkeley, reflects a turn back to the Supreme Court. Now, however, the tenured professor at Berkeley subjects the Court to a very different mode of analysis than did the associate professor at Colorado. The early *Police Power* article implicitly views the Court's decisions as sources of value to which an academic legal theory owes a substantial measure of fealty. The articles of the late 1980s and early 1990s, in contrast, regard the Court's decisions as political statements. Sax analyzes them, quite astutely, as a reflection of the justices' political aspirations and of the constraints on those aspirations. To some extent, of course, this shift in perspective reflects Sax's growing estrangement from the Court's takings jurisprudence. But, it may also reflect a more general turn in legal academic circles, most pronounced in the work of critical legal studies, toward analyzing judicial decisions in ideological terms.

In the last cluster of articles, focusing on proposed property rights legislation, Sax is most clearly influenced by his institutional affiliation—he is by this time a political appointee in the Clinton administration. The Clinton administration consistently opposed takings legislation sponsored by congressional Republicans.²⁴ Counselor Sax was tasked with developing the brief for the Administration's position, and his most recent articles reflect that assignment. Of all his writing on the Takings Clause, these are the most clearly advocacy pieces.

II.

PATHS TAKEN

Notwithstanding the changes in intellectual style from one cluster to the next, Professor Sax's work on the Takings Clause reflects relatively few deviations from certain central themes and values. In terms of development, the scholarship becomes more sophisticated between the first article of 1964 and the second cluster of articles starting in 1971. After that, however, the basic direction of the ideas remains fairly set. Although the later articles are well written and provocative, Sax, like most us, has settled on certain familiar perspectives in thinking about the compensation problem.

23. See Sax, *Decline*, *supra* note 8.

24. See Sax, *Using Property Rights*, *supra* note 18, (citing Private Property Protection Act, H.R. 925, 104th Cong. (1995); Omnibus Property Rights Act of 1995, S. 605 (1996); S. 1954 (1996)). See also Sax, *Takings Legislation*, *supra* note 18, citing H.R. 925; S. 605; Job Creation and Wage Enhancement Act of 1995, H.R. 9, 104th Cong., 1st Session (1995); Private Property Owners Bill of Rights, H.R. 3875, 103d Cong., 2d Sess. (1994); Just Compensation Act, H.R. 1388, 103d Cong., 1st Sess. (1993).

To illustrate, I will consider a number of themes or ideas that pervade Professor Sax's writings on the Takings Clause: (1) opposition to compensation; (2) opposition to the diminution in value test; (3) use of public choice concepts; (4) concern that compensation threatens environmental protection; and (5) belief in the inevitability of greater public control over natural resources. In each case, I briefly trace the progression of the theme throughout his work and offer a few comments on how each tends to settle into an established pathway over time. In the next Part, I turn to a final theme, the need for a new definition of property.

A. *Opposition to Compensation*

Professor Sax's antipathy to compensation appears throughout his work. Even the early *Police Power* article, which offers an affirmative theory of when the government must compensate,²⁵ seeks to limit the government's duty to compensate. Sax's 1964 theory would deny compensation in any case where the government acts as a mediator, no matter how severe the diminution in value.²⁶ The mediator category includes nearly all zoning and land use planning cases. Hence, on the major issues of controversy, his 1964 theory is anti-compensation.

In later articles, the shift toward anti-compensation becomes more pronounced. The *Public Rights* article offers no affirmative theory of when the government commits a taking. Instead, Sax defines takings as a vestigial category where the government's regulation is not designed to curb a spillover effect. However, the concept of a spillover is almost infinitely elastic. With a little ingenuity, it can be expanded like an accordion to describe almost any conceivable regulation. Sax says, for example, that a new development that imposes additional expenses on the local police department in responding to emergencies is a spillover.²⁷ Since, at some level, all new development has such an effect, this revised theory would deny compensation for any prohibition on new development, no matter how restrictive. Unfortunately, Sax never confronts the problems associated with the elasticity of the concept of spillovers, which leaves his revised theory underdeveloped.

25. Sax in fact identifies one circumstance in which he believes the courts have improperly denied compensation: where railroads have been ordered to construct grade crossings at their own expense. Sax, *Police Power*, *supra* note 1, at 70. He reasons that the government acts as an enterpriser in constructing and maintaining highways. Hence the government, not the railroad, should be required to pay for overpasses designed to improve the safety of highway travel.

26. See Sax, *Police Power*, *supra* note 1, at 62-63.

27. See Sax, *Public Rights*, *supra* note 7, at 162.

Although the 1971 article reduces the duty to compensate to a vestigial category, at least it recognizes a domain where compensation is still appropriate. In his more recent articles, it is not clear that Professor Sax would make any provision for compensation outside traditional exercises of eminent domain. These articles contain no sustained discussion of the question, instead presenting noncompensation for regulatory takings as if it were an established norm, or at least a soon-to-be-established norm.²⁸

To the extent that Sax's more recent articles seek to justify the practice of noncompensation in regulatory takings cases, they offer a variety of suggestions, usually presented with little elaboration. In a lecture presented at the University of Washington Law School in 1983, he suggested that noncompensation in regulatory cases is justified because owners have received offsetting benefits from public investment in infrastructure, and because owners are already on notice that they will not be afforded compensation.²⁹ In his 1993 *Economy of Nature* article, Sax offers an argument that sounds remarkably like social Darwinism: it is best not to compensate for regulatory takings because this encourages "adaptive behavior by rewarding individuals who most adroitly adjust in the face of change."³⁰ In other words, noncompensation is desirable because it helps insure the survival of the fittest among property owners. It is hard to know what to make of these various suggestions, since none is developed fully. Instead, the themes emerge and recede from one article to the next.

More fundamentally, by only discussing sharply contested regulatory takings cases, and ignoring "easy" cases like the taking of a fee simple for a new post office or highway, Sax evades the most compelling arguments in favor of compensation. True, he never suggests in his more recent writings that he would deny compensation in cases involving conventional exercises of eminent domain. But if not, then why not? And if compensation is normatively defensible or required in the conventional cases, do any of these reasons carry over to contestable cases involving, say, wetlands or historical preservation orders? After 1971, Sax only gives us reasons not to compensate, leaving us well short of a complete theory of the Takings Clause.

In sum, Sax's writings on the Takings Clause consistently manifest his aversion to compensation. The early writings strive to rationalize this commitment within a principled theory. The later writings betray a more unyielding stance on compensation. They feature a variety of suggestions in support of this position, none developed to the level of a complete theory. The picture emerges of an author with a primary

28. See Sax, *Decline*, *supra* note 8, at 493.

29. See Sax, *Decline*, *supra* note 8 at 494-95.

30. Sax, *Economy of Nature*, *supra* note 15, at 1449.

value commitment that serves initially as an inspiration for original academic work, but which eventually ossifies into a reflexive position.

B. *Opposition to Diminution in Value*

Similarly, Sax consistently opposes the idea that diminution in value alone should trigger a duty to compensate. Sax attributes this idea to several Holmes opinions,³¹ including, of course, *Pennsylvania Coal Co. v. Mahon*.³² There, the Court held that the duty to compensate should turn in part on whether the government has gone "too far" in diminishing the value of property through regulation. To a considerable extent, Sax sees the takings battlefield as one that pits the proponents of diminution in value against those like himself who would give the government free rein to regulate externalities.

Sax's 1964 *Police Power* article includes a sustained attack on diminution in value. His critique of this idea, mounted on both historical and conceptual grounds, is highly effective. For example, he clearly identifies what Frank Michelman was soon to call the numerator/denominator problem: the percentage of diminution will often be a function of how finely one slices the property that is the subject of the regulation.³³ Although Justice Brandeis made what was in effect the same observation, dissenting in *Mahon*,³⁴ Sax was, I believe, the first to generalize the point. In so doing, he fully anticipated Michelman by three years.

Later articles continue to present diminution in value as "the dominant doctrinal model of takings law"³⁵ and the foil against which Sax advances his own ideas. This may explain why Sax was moved to write two articles on the Court's decision in *Lucas*.³⁶ *Lucas* creates a categorical takings rule that requires compensation for non-nuisance regulations that result in a 100% diminution in value.³⁷ The decision thus enshrines the idea of diminution in value in takings jurisprudence, contrary to one of Sax's most strongly held normative commitments.

There is some justification for Sax's assumption that the pro-compensation position is synonymous with the diminution in value test. After all, recent proposed taking legislation adopts diminution in

31. See, e.g., Sax, *Police Power*, *supra* note 1, at 40-41; Sax, *Public Rights*, *supra* note 7, at 151.

32. 260 U.S. 393 (1922).

33. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967).

34. See 260 U.S. at 419-20 (dissenting opinion).

35. Sax, *Public Rights*, *supra* note 7, at 151.

36. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

37. See *id.* at 1019

value as a trigger for legislatively mandated compensation.³⁸ So the idea clearly has staying power.

Yet if we examine recent judicial developments more carefully, diminution in value is not the only dragon Sax needs to slay. The old physical invasion test has shown more generative power in recent years. It spawned a new *per se* rule in the *Loretto* case³⁹ and then served as the predicate for extending the "unconstitutional conditions" doctrine to takings law in the *Nollan* and *Dolan* cases.⁴⁰ Along the way, the *per se* rule expanded from permanent physical occupations to include permanent public servitudes.⁴¹ And the *Dolan* decision leverages the unconstitutional conditions doctrine into a requirement that state courts apply an intermediate "rough proportionality" standard of review to land use exactions.⁴²

Less dramatically, but with similar potential for future development, the 1988 *Duquesne*⁴³ decision reaffirmed the "competitive rate of return" standard from the old public utility rate cases.⁴⁴ Lower courts have applied that standard in reviewing, and sometimes overturning, certain rent control and price control provisions.⁴⁵ This line of cases has been invoked more recently by proponents of the view that introducing competition in industries traditionally served by regulated monopolies may create a taking by "stranding" investments made by the incumbents, who assumed their monopolies would continue.⁴⁶

38. See *supra* note 24 and sources cited therein.

39. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

40. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). On the relationship between the physical invasion test and the unconstitutional conditions doctrine, see Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENVER U. L. REV. 859, 863 (1995).

41. Compare *Loretto*, 458 U.S. at 432-33 ("permanent physical occupations" are *per se* takings), with *Nollan*, 483 U.S. at 832 (a permanent easement of public passage is equivalent to a "permanent physical occupation"); see also *Dolan*, 512 U.S. at 394 (permanent dedication of land for flood control purposes and use as a bicycle path is a "permanent recreational easement").

42. See 512 U.S. at 391.

43. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 314 (1989).

44. See, e.g., *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n*, 262 U.S. 679 (1923).

45. See, e.g., *Guaranty Nat'l Ins. Co. v. Gates*, 916 F.2d 508 (9th Cir. 1990) (striking down Nevada statute freezing auto insurance rates because it failed to guarantee a fair return to insurance companies); *Birkenfeld v. City of Berkeley*, 550 P.2d 1001 (Cal. 1976) (applying public utility standard and striking down municipal rent control amendment as not assuring a fair return to property owners).

46. Compare J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. REV. 851 (1996), with William J. Baumol & Thomas W. Merrill, *Deregulatory Takings, Breach of the Regulatory Contract, and the Telecommunications Act of 1996*, 72 N.Y.U. L. REV. 1037 (1997).

Sax, however, has shown no interest in assessing the plausibility of expanded takings protection under these alternative rubrics. Instead, he has been content to stalk his old enemy, diminution in value. This suggests that he has become relatively disengaged from ongoing developments in takings law, perhaps understandably given his other academic commitments. But this disengagement obviously comes at a price in terms of his impact on the debate.

C. Public Choice Concepts

The use of public choice ideas in interpreting the Takings Clause is a third important theme in Sax's work. In this regard, he is unquestionably a pioneer. The *Police Power* article does not cite any of the then-incipient public choice literature, yet at times seems to anticipate one of the central insights of public choice theory: that concentrated and well-organized minorities often have greater influence over government policy than diffuse majorities.⁴⁷ The *Public Rights* article represents Sax's most explicit and innovative use of public choice ideas. There he deploys Mancur Olson's distinction between concentrated and diffuse interests in developing the theoretical justification for denying compensation in all cases involving the regulation of spillovers.⁴⁸ Other scholars did not discover the usefulness of public choice ideas in interpreting the Takings Clause until more than a decade later.⁴⁹

According to the *Public Rights* article, when the government regulates spillovers, it chooses between conflicting uses of property. Sax does not assume that, absent a requirement of compensation, the government will always resolve the dispute in the most efficient way.⁵⁰ He concedes that decisions taken without compensation will often be imperfect. However, drawing on the ideas of Olson, Sax argues that compensation will systematically distort the calculus because it will be asymmetric. If a conflict is resolved against landholders and in favor of diffuse interest-holders, then compensation will often be required. But if a conflict is resolved in favor of landholders and against diffuse interest-holders, compensation will almost never be required.⁵¹ Any

47. See Sax, *Police Power*, *supra* note 1, at 64. For an overview of public choice theory, see DANIEL A. FARBER and PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

48. Sax, *Public Rights*, *supra* note 7, at 174. See Mancur Olson, *THE LOGIC OF COLLECTIVE ACTION* (1965).

49. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); Saul Levmore, *Takings, Torts and Special Interests*, 77 VA. L. REV. 1333 (1991); Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892, 1954-1963 (1992); Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279 (1992).

50. See Sax, *Public Rights*, *supra* note 7, at 172.

51. *Id.* at 160.

compensation requirement will therefore systematically tip the balance in favor of traditional property interests and against diffuse interest-holders, even though this may mean that conflicts will be resolved inefficiently.⁵²

The argument is ingenious, but incomplete. Sax never focuses on the fact that the landholders, precisely because they are a concentrated interest, are likely to exert disproportionate influence on the regulatory process whether or not they are awarded compensation.⁵³ Indeed, recent commentators have argued that if concentrated groups like landholders are *not* compensated, they are likely to lobby furiously to influence the outcome of regulatory proceedings involving spillovers.⁵⁴ These commentators have suggested, directly contrary to Sax, that it may be better to "buy off" such groups with compensation rather than risk their undue interference with efficient decision making.

Thus, theorists advance two more-or-less opposite arguments based on the same public choice premise about the dominating influence of concentrated minorities. Sax argues that regulators will be unduly influenced in favor of traditional property interests if compensation is available for regulatory takings. Others have argued that regulators will be unduly influenced in favor of traditional property interests if compensation is *not* available for regulatory takings.

Sax has shown no continuing interest in these new applications of public choice concepts to takings controversies and hence has neither responded to the new thinking nor made any attempt to refine his own early efforts.⁵⁵ Why he has not addressed the public-choice inspired discussion about takings is unclear. Sax may find the model of the state employed by most modern public choice theorists thoroughly uncongenial. Modern public choice theory tends to view the state as an agent or instrumentality of interest groups. Sax, while no Pollyanna about government, very much believes that there is something

52. Sax also argues that a compensation requirement will interfere with regulatory programs designed to force enterprises to internalize the costs of spillovers that they create on the theory that they are the cheapest cost avoiders. *Id.* at 182-83. He stresses in particular that enterprise liability may lead to innovations in products or production techniques. *Id.*

53. See BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 56 (1977).

54. See Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 125, 131; Lunney, *supra* note 49, at 1954-63.

55. Sax cannot be wholly unaware of the new wave of public choice inspired work, since in 1986 he wrote a substantial review of Richard Epstein's book on the Takings Clause, a work strongly influenced by public choice reasoning. His reaction to Epstein's book was extremely dyspeptic, however. See Sax, *Takings*, *supra* note 8, at 279. The review essentially consists of a flurry of punches directed at Epstein's arguments (many of which Sax lands) but makes no effort to engage Epstein's thesis on its own terms.

called the "public interest" separate and apart from the balance of interest group influences and that government can and should promote such a public interest. Thus, Sax was able to harness Olson's early public choice ideas in elaborating his vision of a government that regulates land use conflicts without distorting influences, i.e. in pursuit of the public interest. But he has not brought himself to engage with those who use public choice theory to suggest that the government is simply the pawn of private interests.

D. Compensation Threatens Environmental Values

Throughout his work, Sax demonstrates a strongly held conviction that compensation is antithetical to environmental values. There is barely a hint of this in the 1964 *Police Power* article,⁵⁶ but it emerges clearly in the 1971 *Public Rights* article, and never departs thereafter.

As we have seen, the *Public Rights* article argues that compensation skews government decision making away from efficient outcomes when a spillover adversely affects diffuse interests shared by large numbers of people, but benefits a small concentrated interest. The article makes clear that environmental controversies are the paradigmatic situation in which compensation interferes with efficient decision making in this manner. The examples Sax uses include strip mining, filling of wetlands, and automobile pollution.⁵⁷ Thus, the *Public Rights* article argues, in effect, that requiring compensation in spillover cases produces inefficiency and that the primary inefficiency is inadequate environmental protection.⁵⁸

Significantly, in his *Public Rights* article Sax recognizes that under his no-compensation-for-spillovers rule, the question of who should bear the costs does not go away; it simply is shifted from the courts to the legislature.⁵⁹ He identifies several models from which the legislature might choose in allocating those costs, including: cost internalization by large corporate enterprises, based on the products liability model; partial denial of compensation through legislative adoption of the old nuisance prevention rule; or perhaps awarding compensation to "[t]hose who are truly devastated economically," based on the model of governmental relief given to victims of natural

56. See Sax, *Police Power*, *supra* note 1, at 62-63.

57. See Sax, *Public Rights*, *supra* note 7, at 153, 157, 159, 182.

58. Sax is sensitive to the charge that his rule of no-compensation-for-spillovers is simply designed to lower the costs of environmental regulation, thereby "subsidizing" the environmental cause at the expense of traditional property owners. Indeed, his 1971 article can be seen as an effort to rebut that charge. Sax invokes a "neutral principle" (i.e. economic efficiency) to illustrate that compensation interferes with the resolution of conflicting uses in the way that is most likely "to maximize total net benefits." Sax, *Public Rights*, *supra* note 7, at 186.

59. See Sax, *Public Rights*, *supra* note 7, at 177.

disasters.⁶⁰ Although Sax does not endorse any of these models, he implies that each is a reasonable option that could be adopted by legislatures in different circumstances. In principle, therefore, he is not opposed to legislative compensation, just to judicial compensation.

In the third cluster of articles, particularly the 1993 *Economy of Nature* article, Sax no longer stresses the practical impediment to environmental regulation that compensation represents. To do so would be inconsistent with his thesis that the rule of no compensation for regulatory takings has already been, or is about to be, established. Instead, he presents the harm from compensation as largely symbolic—a backlash against expanding government regulation engineered by those, like Justice Scalia, who believe in the bad old “transformative economy” rather than in the “economy of nature.” According to Sax, *Lucas* represents Justice Scalia’s attempt to convince the public that private property trumps ecological values. Sax, however, clearly regards this symbolic setback as only temporary. Indeed, the *Economy of Nature* article seeks to expose Scalia’s symbolic politics for what they are, thereby diffusing the *Lucas* opinion’s capacity to impede the transformation in public attitudes toward the new ecological vision of interconnected property.

In the most recent cluster of articles on takings legislation, Sax drops both his efficiency theory and his concern with symbolic politics. Now, he condemns the proposed property rights statutes as a direct assault on the environment.⁶¹ Because environmental legislation has become such a popular cause, he says, its opponents cannot risk candid or open attempts to repeal or amend it. Instead, they devise schemes to require compensation when, for example, wetlands regulation under the Clean Water Act or habitat protection under the Endangered Species Act diminishes the value of property by more than a certain threshold level, such as 10 percent.⁶² Because such legislation requires that this compensation be paid out of agency budgets, which are already strapped, Sax argues that the agencies will have no choice but to stop regulating. Compensation will therefore achieve a *de facto* repeal of widely supported legislation by the enemies of the environment.

In these more recent articles, Sax argues that we should stick to the compensation standards carefully developed over the years by the Supreme Court instead of mandating compensation by legislation. He poses the following question to the proponents of takings legislation:

Why are you departing from the substantive standard for compensating property owners that has uniformly commended itself to the

60. See *id.* at 177-179.

61. See Sax, *Using Property Rights*, *supra* note 18, at 1.

62. See *supra* note 24 and sources cited therein.

Supreme Court for the entirety of our national history, and why are you substituting for that standard a standard that the Court has explicitly and uniformly rejected—that is, ‘mere measure of the diminution of value?’⁶³

There is considerable irony in this odyssey. In 1971, Sax wrote that courts should get out of the compensation business insofar as the environment is involved and leave it to the legislature. Twenty five years later, he argues that the legislature should stay out of the compensation business insofar as the environment is involved and leave it to the courts. It is not clear that Sax has a consistent theory of institutional choice. All we know for sure is that Sax believes compensation is bad for the environment.

Whether compensation is in fact bad for the environment is probably a far more complicated question than Sax is willing to acknowledge. Highways get built, even though the government has to pay compensation for land taken. Would more highways get built if compensation were not required? Any one who has witnessed a neighborhood mobilizing in opposition to a proposed new highway, even though property owners know they will receive compensation, may well wonder what the reaction would be if they were told their property would be expropriated. It is at least arguable that the policy of not compensating owners denied permits to fill wetlands or prohibited from altering habitats of endangered species has contributed more to fueling political opposition to these programs than anything else.⁶⁴ Tragically, this policy may also contribute to premature destruction of natural and cultural resources as owners scramble to develop before they are barred by non-compensatory regulation.⁶⁵

Moreover, if public support for environmental protection is as strong as Sax says it is (and I tend to agree with him), then I see no reason why the political system will not come up with the money for the required compensation. After all, many people argued that we could not end the draft—a kind of taking of labor without just compensation⁶⁶—and move to an all-volunteer armed forces because the public would not tolerate the higher taxes it would take to pay for volunteers. But the all-volunteer army has worked out pretty well. Indeed, one major benefit of moving to the all-volunteer army, from the point of view of those who think we need a strong national defense force, is that the potent political opposition from those exposed

63. Sax, *Takings Legislation*, *supra* note 18, at 512.

64. See *supra* note 49 and accompanying text.

65. See David A. Dana, *Natural Preservation and the Race to Develop*, 143 U. PA. L. REV. 655 (1995).

66. William A. Fischel, *The Political Economy of Just Compensation: Lesson from the Military Draft for the Takings Issue*, 20 HARV. J.L. & PUB. POL'Y 23 (1996).

to the draft has been eliminated. As memories of the draft recede into the past, the drift of national sentiment toward isolationism in the late 1960s and early 1970s has gradually been reversed.

My guess is that paying for the preservation of ecosystems, at least when all developmental uses of the property are prohibited, would have similar consequences. In most cases, regulators would discover mitigation devices, swaps, and other compromises, thus eliminating the need for compensation.⁶⁷ Perhaps the greatest benefit, as in the case of the all-volunteer army, would be to take the wind out of the sails of the opponents of these programs. Wetlands and habitat preservation programs could be debated on their own merits, rather than through the lens of legal arguments about constitutional rights.

E. The Inevitable Triumph of Public Control

Finally, Sax assumes an historical inevitability about the evolutionary path of the institution of property. For Sax, it is an unshakable article of faith that property will become increasingly interconnected and interdependent over time. The sphere of individual sovereignty over resources will steadily recede, while the realm of collective sovereignty will expand. It is from this historicist assumption, more than anything else, that all his commentary about compensation policy, Supreme Court decisionmaking, and proposed takings legislation flows.

Perhaps the clearest statement of Sax's historicist thesis is his University of Washington lecture, appropriately titled *Some Thoughts on the Decline of Private Property*.⁶⁸ There, Sax contrasts what he calls "exclusive consumption values," which he says are in decline, and "nonexclusive consumption values," such as environmental and historic preservation, which he finds ascendant. Sax explains this trend by pointing out that economic growth and congestion cause increasing scarcity in nonexclusive consumption goods and that social values have changed to favor preservation over destruction of existing ecological systems and communities. He then argues against providing compensation for collective action designed to preserve or enhance nonexclusive consumption values. He predicts that "the path of noncompensation seems rather clearly set," and that "we are going to have to come to terms with the prospect that planning (a word Americans don't like), rather than property, is going to be a principal engine of social benefit production in the future."⁶⁹ In short, interconnected-

67. See generally E. Donald Elliott, *How Takings Legislation Could Improve Environmental Regulation*, 38 WM. & MARY L. REV. 1177 (1997).

68. Sax, *Decline*, *supra* note 8, at 481.

69. *Id.* at 495. A similar thesis, although stated in less starkly historicist terms, underlies the 1971 *Public Rights* article and the 1993 *Economy of Nature* article.

ness will steadily rise with the result that collective regulation will steadily rise, which in turn requires that compensation steadily recede.

I find this historical inevitability thesis at best incomplete as an account of the fate of private property and compensation policy. To be sure, Sax is right that, with respect to property in land and natural resources, spillovers or interdependencies rise with growing population and growing numbers of things per person. And, he is right that values and attitudes have radically changed in the last 25 years or so toward greater appreciation of natural systems and the increasingly rare pristine environments. Finally, he is surely right that with rising interdependencies and changing values, government will continue to become involved in land use and resource development issues in ways not contemplated in the past.

But I do not think it follows that private property is about to wither away, like the bourgeois state after the proletarian revolution.⁷⁰ If we lift our gaze from controversies over land use and consider other kinds of productive assets, private property clearly is ascendant around the world. There can be no question that the business corporation, owned by shareholders as a form of private property, dominates other modes for organizing machinery and labor. This phenomenon is not limited to the demise of socialist factories in Eastern Europe. Even in capitalist countries, wide-ranging transformation is taking place in the provision of infrastructure services—such as telecommunications, electricity, natural gas, rail and airline transportation—which rapidly are being privatized and deregulated almost everywhere.⁷¹ Intellectual property rights also are likely to play an increasingly important role in the globalized economy of the early twenty-first century.

Even within the realm of primary concern for Sax—environmental regulation—we see increased use of market-like mechanisms to achieve environmental goals. From acid rain control to water quality management to global warming, important programs and proposals have borrowed from the idea of private property in devising self-executing mechanisms to solve important environmental problems.⁷² Of course, these market mimicking mechanisms have been established by public regulation. But the fact that public regulation turns to prop-

70. See FRIEDRICH ENGELS, HERR EUGEN DUHRING'S REVOLUTION IN SCIENCE [ANTI-DUHRING] 301-03 (3d ed., Stuttgart 1878).

71. See Joseph D. Kearney and Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. (forthcoming Oct. 1998) (detailing this transformation).

72. See, e.g., TIMOTHY WIRTH, PROJECT 88: HARNESSING MARKET FORCES TO PROTECT OUR ENVIRONMENT (1988). Some have gone further and argued that nearly all environmental problems can be solved through creative free-market solutions. See TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM (1991).

erty-like and market-like mechanisms to achieve more efficient, and often more rapid, attainment of environmental goals suggests that the great antipathy posited by Sax between private property and public values is overly simplistic.

Indeed I think Sax's historicist thesis fails, ironically, in giving excessive credence to the public/private distinction. Private property is an institution that depends on the government for its existence. Public regulation is a system that depends on private support for its existence. What recent history reveals, I think, is not that private property naturally evolves into public regulation. Rather, it suggests that as resources become increasingly scarce and hence increasingly valuable, and as values change about what sorts of things are worth preserving, more institutional capital is devoted to protecting such scarce natural resources.⁷³ Sometimes this institutional capital will look like command and control regulation. Sometimes it will look more like new forms of private property. And oh yes, sometimes it will make sense to provide compensation to individuals who get singled out for disproportionate burdens in order to smooth the transition toward a more complex regime that reflects different values.

Sax of course is acutely aware that increasing demands on resources can lead to changes in legal institutions. His early work on the public trust doctrine and the need for environmental protection legislation is ample testimony to this.⁷⁴ Unfortunately, his sensitivity to the need for legal evolution was forged at a time when the tide was running exclusively toward collective controls. It now appears, however, that collective controls are only one response, and not necessarily the most effective one, to the phenomenon of increasing scarcity of environmental resources. Yet Sax (along with a large segment of the environmental community) is stuck in a mode of thought that associates private property rights with exploitation, degradation, and externalities and sees collectivization as the only viable response.

III.

A PATH NOT TAKEN

The most ambitious feature of Sax's takings scholarship is his desire to redefine the institution of property. It is also, perhaps, the most revealing in terms of where he stands in relation to some of the other leading lights of modern takings jurisprudence. This dimension

73. See Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 972-976 (1997); Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 14.

74. See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) [hereinafter Sax, *Public Trust*]; Joseph L. Sax, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* (1971).

of Sax's work raises interesting questions about a path not taken. Although Sax continually announces he is urging a redefinition of the traditional conception of property, I would argue that he starts from an unconventional understanding of property—property as wealth rather than property as specific assets. And, although Sax claims to solve the dilemma of interconnected property by redefining property, in fact what he proposes is a vast expansion of the police power.

The *Police Power* article inaugurates Sax's project of seeking a new definition of property. The diminution in value test, Sax writes, rests on a "false definition of property." To formulate a better theory, it is necessary "to develop a workable concept of what we mean when we talk about property."⁷⁵ The *Public Rights* article picks up where the 1964 *Police Power* article leaves off. "The abandon with which private resource users have been permitted to degrade our natural resources," Sax states in the introduction, "may be attributable in large measure to our limited conception of property rights."⁷⁶ The most basic task of the *Public Rights* article, therefore, is to contrast "the traditional view of property rights, which focuses solely on activities occurring within the physical boundaries of the user's property," with a new view of property "seen as an interdependent network of competing uses."⁷⁷

Twelve years later, in restating his thesis at the University of Washington, Sax argues that "we" are losing faith in the traditional system of private property, because that system "regularly fails to allocate property to 'correct' uses."⁷⁸ This failure, he announces, is giving rise to a new conception of property that stresses "nonexclusive consumption values" rather than "exclusive consumption values." In the 1993 *Economy of Nature* article, property is still being redefined. Now we learn that there are two "fundamentally different" views of property rights: "land in the transformative economy" and "land in the economy of nature."⁷⁹

I am puzzled by Sax's obsession with redefining property, for three reasons. First, Sax never gets down to brass tacks in defining traditional property. Property rights often are characterized by a trilogy of entitlements: the right to exclude, the right to consume, and the right to transfer. Various authors have debated which (if any) of these entitlements is a necessary or sufficient condition for speaking of

75. Sax, *Police Power*, *supra* note 1, at 61.

76. Sax, *Public Rights*, *supra* note 7, at 150.

77. *Id.*

78. Sax, *Decline*, *supra* note 8, at 484.

79. Sax, *Economy of Nature*, *supra* note 15, at 1442.

property and so forth.⁸⁰ Sax's writings about the Takings Clause contain no hint of such an exercise. This absence is curious, since presumably one undertaking to redefine property would begin by seeking an understanding of the old definition.

Second, Sax's descriptions of his new definition of property operate at such a high level of generality that they are not very illuminating. In his 1964 *Police Power* article, for example, he proposes to redefine property as "the end result of a process of competition among inconsistent and contending economic forces."⁸¹ One could just as easily substitute a phrase like "public policy" for "property" in this sentence, and the meaning would not change.

Third, to the extent that Sax explains how the new property will differ from the old, it appears that the definition of "property" has not really changed at all. Rather, what has changed is the conception of the scope of the police power—that is, the range of government regulation of property that is permissible without payment of compensation. His *Economy of Nature* article contains perhaps the most complete description of the differences between the old property and the new. What changes, however, is not the identity of the things we can point to and call "property." Instead, it is our understanding of the duties and attitudes of owners toward their property. Thus, he says that in the transformative economy "[l]andowners have no obligations," whereas in the economy of nature "[l]andowners have a custodial, affirmative protective role for ecological functions."⁸² Notice that in both cases Sax speaks of the "landowner," i.e. an identifiable individual with title to the land. This suggests that Sax does not have any problem with the traditional concept of property; he just wants to change the obligations that go with it.

Why then is Sax so agitated about the concept of property? Leif Wenar's recent article⁸³ seeks to explain why Sax feels compelled to reexamine the roots of our understanding of property. According to Wenar, Sax and his contemporary Michelman, as well as their chief antagonist Richard Epstein, are all products of the Hohfeldian revolution in the understanding of property as a bundle of rights rather than things. Once one assimilates the bundle of rights understanding, Wenar argues, then one tends to assume that each property right is itself property. And once one assumes that each property right is it-

80. See, e.g., JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 26-61 (1988); A.M. Honore, *Ownership*, in *OXFORD ESSAYS IN JURISPRUDENCE* 107, 112-24 (A.G. Guest ed., 1961).

81. Sax, *Police Power*, *supra* note 1, at 61.

82. Sax, *Economy of Nature*, *supra* note 15, at 1445.

83. Leif Wenar, *The Concept of Property and the Takings Clause*, 97 COLUM. L. REV. 1923 (1997). Wenar is a philosopher at the University of Sheffield.

self property, then taking any stick in the bundle of rights is itself an unconstitutional taking that requires compensation. Sax and Michelman are both horrified by this prospect, albeit for different reasons. If any interference with rights in property is a taking, then the government will be hard pressed to change the status quo, whether it be to redistribute wealth to the poor (Michelman's project) or intensify government regulation of the environment (Sax's project). Epstein, on the contrary, is delighted by this prospect because he likes the idea that the Takings Clause bars all deliberate government efforts to redistribute wealth.

I am not sure that I agree with Wenar that Hohfeld, who is not cited in any of Sax's work on the Takings Clause, is the cause of Sax's agitation about the definition of property. But, I do agree that Sax, like Michelman and Epstein, implicitly rejects what Bruce Ackerman calls the "Ordinary Observer's" or "Layman's" perspective on property,⁸⁴ i.e. property as specific assets or "things." I also agree that for Sax, like Michelman and Epstein, the Takings Clause has a potential significance far beyond a rule that requires compensation when the government condemns specific assets or takes actions functionally equivalent to the condemnation of specific assets.

However, I would offer a slightly different characterization of the critical difference between "Layman's property" and what Sax, Michelman, and Epstein all assume to be the subject of the Takings Clause. For each of these three thinkers, the Takings Clause is not about protecting specific "things" (or sunk investments in nonfungible things). Rather, it is about protecting undifferentiated wealth. The Takings Clause, which says "nor shall private property be taken for public use without just compensation," is perceived by each of these thinkers in effect to read: "nor shall an individual's net worth be reduced for public use without just compensation."⁸⁵

The equation of "property" with undifferentiated wealth has momentous implications for all three thinkers. If the Takings Clause is about the distribution of wealth, this gives rise to the prospect that existing shares of wealth must be frozen in their current configuration.

84. ACKERMAN, *supra* note 53, at 97-100.

85. In offering this observation about Sax's approach to the Takings Clause, I have become something of a broken record, since I have previously made similar observations about other scholars' analyses of private property. See Thomas W. Merrill, *Wealth and Property*, 38 U.C.L.A.L. REV. 489 (190) (reviewing STEPHAN R. MUNZER, *A THEORY OF PROPERTY RIGHTS*) (1990)); Thomas W. Merrill, *Zero-Sum Madison*, 90 MICH. L. REV. 1392 (1992) (reviewing JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* (1990)); cf. Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 N.WEST U. L. REV. 1561 (1986) (reviewing RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985)) (arguing that Epstein is primarily concerned with preventing redistribution of wealth).

After all, if "property" means wealth, and property cannot be taken without compensation, then any attempt to change the distribution of wealth will be immediately offset by the payment of compensation.

Epstein embraces and celebrates this implication and develops a theory to bar any and all deliberate efforts to redistribute wealth. Michelman strongly resists this implication and has devoted much of his career to developing a theory of "just compensation" that provides room for deliberate government redistribution to aid the poor. Sax, like Michelman, resists the anti-redistributive implications of a Takings Clause thought to encompass undifferentiated wealth. Sax's central concern, however, is not the poor, but environmental protection. Sax does not want the Takings Clause to stand as a barrier to environmental regulations, where such regulations inevitably cause shifts in the distribution of wealth.

Once we hypothesize that Sax's underlying anxiety about property is caused by the unstated assumption that property means wealth, many of the central features of his work fall into place. His hostility to compensation and his aversion to the diminution in value test flow logically from a concern that the Takings Clause will be understood to bar all wealth redistribution. We can also understand why he felt it was so vital to redefine property. If property means wealth, then the Takings Clause is a very formidable threat to activist government, including government devoted to increased environmental protection.

If this conjecture is correct, then it leads to a very interesting possibility about paths not taken. The general strategy of Sax's work on the Takings Clause is to meet the challenge presented by an expansive definition of property with an expansive conception of the police power: any government regulation of interconnected property is *per se* not a taking. But an alternative way to avoid the dilemma would be simply to adopt the conventional, "Layman's" understanding of property as things or specific assets. Viewing property as specific assets would limit the Takings Clause to government actions that seize, destroy, or occupy identifiable owned assets and perhaps to government regulations that have an equivalent effect, such as regulations that impose a permanent public servitude on an asset or destroy 100% of an asset's value. On such an understanding, the Takings Clause would pose little threat to most environmental regulations. Consequently, there would be no need to counteract the Clause with an expanded definition of the police power.

Why this particular move never occurred to Sax, or if it occurred to Sax, why it never appealed to him, I am not sure. Perhaps Wenar is right that at some subconscious level Hohfeld is to blame. Perhaps the academic preoccupation with inequalities of wealth in the late 1960s and 1970s (and beyond), which tends to find major issues of

distributive justice in relatively discrete constitutional provisions, is to blame. Perhaps the key lies in Sax's work promoting an expansion of the public trust doctrine,⁸⁶ which committed him in another context to undermining traditional understandings of property rights. In any event, it is not too late for Sax, or any one else for that matter, to revisit the assumption that property must be redefined if we are to save the environment from the terrors of the Takings Clause. All that may be needed is to insist that the Clause be interpreted in accordance with the original understanding of what private property means: specific assets rather than undifferentiated wealth.⁸⁷

86. See Sax, *Public Trust*, *supra* note 74.

87. After this article was written, the Supreme Court, by a vote of five to four, agreed that the Taking Clause applies only to interferences with specific assets, and ruled that regulation reducing general wealth must be challenged under the Due Process Clause. See *Eastern Enterprises v. Apfel*, 118 S.Ct. 2131, 2154-58 (1998) (Kennedy, J., concurring); *id.* at 2161-64 (Breyer, J., dissenting).

